

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOE PICENO,

Plaintiff,

v.

TIM GARRETT,

Defendant.

Case No. 3:22-cv-00001-MMD-CLB

ORDER

I. SUMMARY

This is a habeas corpus action under 28 U.S.C. § 2254. The Court ordered petitioner Joe Piceno to pay the filing fee. (ECF No. 2.) The docket does not reflect payment, but Piceno has paid the filing fee. The Court has reviewed the petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The Court dismisses the action because Piceno has filed an unauthorized second or successive petition.

II. BACKGROUND

The Court takes judicial notice of three cases that Piceno filed in this Court: *Piceno v. LeGrand*, Case No. 3:11-cv-00588-RCJ-WGC (“*Piceno I*”), *Piceno v. LeGrand*, Case No. 3:14-cv-00545-RCJ-WGC (“*Piceno II*”), and *Piceno v. Garrett*, Case No. 3:21-cv-00156-MMD-CLB (“*Piceno III*”). The Court also takes judicial notice of a case that Piceno filed in the United States Court of Appeals for the Ninth Circuit: *Piceno v. Neven*, Case No. 20-72721 (“*Piceno IV*”).

In the Eighth Judicial District Court of the State of Nevada, Case No. 96C134909, Piceno was convicted of sexual assault with the use of a deadly weapon and attempted murder with the use of a deadly weapon. (ECF No. 1-1 at 3.) The Nevada Supreme Court affirmed his judgment of conviction on August 8, 2000. *See Piceno I*, ECF No. 6 at 4.

1 On August 3, 2011, Piceno dispatched a federal habeas corpus petition that
 2 became *Piceno I*. The Court dismissed the petition as untimely under 28 U.S.C.
 3 § 2244(d)(1), and the Court denied a certificate of appealability. See *Piceno I*, ECF No.
 4 9. Piceno appealed, and the Ninth Circuit denied a certificate of appealability. See *Piceno*
 5 *I*, ECF No. 13.

6 On October 22, 2014, Piceno commenced *Piceno II* with another habeas corpus
 7 petition. The Court noted that the dismissal of *Piceno I* as untimely constituted a
 8 disposition on the merits, meaning that any subsequent petition is subject to the bar
 9 against second or successive petitions of 28 U.S.C. § 2244(b). See *Piceno II*, ECF No.
 10 16 at 2 (citing *McNabb v. Yates*, 576 F.3d 1028, 1029-30 (9th Cir. 2009)). The Court thus
 11 dismissed *Piceno II* because Piceno had not received authorization from the Ninth Circuit
 12 to file a second or successive petition under 28 U.S.C. § 2244(b)(3), and the Court denied
 13 a certificate of appealability. See *Piceno II*, ECF No. 16 at 2. Piceno appealed, and the
 14 Ninth Circuit denied a certificate of appealability. See *Piceno II*, ECF No. 20.

15 On September 11, 2020, Piceno filed in the Ninth Circuit an application for leave
 16 to file a second or successive petition. See *Piceno IV*, ECF No. 1. The Ninth Circuit denied
 17 the application on October 14, 2020. See *Piceno IV*, ECF No. 2.

18 On April 5, 2021, Piceno submitted a “Rule 60(b) subsequent petition” in this Court.
 19 *Piceno III*, ECF No. 1-1. The Court ruled that the petition was a second or successive
 20 petition, and the Court dismissed it because the Ninth Circuit had not authorized Piceno
 21 to file a second or successive petition. See *Piceno III*, ECF No. 3. The Court also denied
 22 a certificate of appealability. See *id.* Piceno did not appeal.

23 **III. DISCUSSION**

24 Before filing a second or successive petition in this Court, Stone must first obtain
 25 authorization from the Ninth Circuit. See 28 U.S.C. § 2244(b)(3). Piceno styles the current
 26 petition as under 28 U.S.C. § 2241, but he still remains in custody under the same state-
 27 court judgment of conviction that was the subject of *Piceno I* through *Piceno IV*. While §
 28 2241 implements the general grant of habeas corpus authority provided in the

1 Constitution, 28 U.S.C. § 2254 implements and limits that authority for a person in custody
2 pursuant to the judgment of a state court. *See Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th
3 Cir. 2008) (en banc). Piceno cannot escape the limitations of § 2254 by styling his petition
4 as under § 2241.

5 As with Piceno II and Piceno III, the current petition is a second or successive
6 petition. *See* 28 U.S.C. § 2244(b); *see also McNabb*, 576 F.3d at 1029-30. Piceno first
7 must obtain authorization from the Ninth Circuit before he can file a second or successive
8 petition. He has not obtained that authorization. The Court thus lacks jurisdiction to
9 consider his petition, and the Court dismisses the action.

10 Reasonable jurists would not find the Court's conclusion to be debatable or wrong,
11 and the Court will not issue a certificate of appealability.

12 **IV. CONCLUSION**

13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion as they do not affect the outcome of the
16 issues before the Court.

17 It is therefore ordered that the Clerk of Court file the petition for a writ of habeas
18 corpus.

19 It is further ordered that this action is dismissed for lack of jurisdiction. The Clerk
20 of Court is directed to enter judgment accordingly and to close this case.

21 It is further ordered that a certificate of appealability is denied.

22 It is further ordered that that the Clerk of Court add Aaron Ford, Attorney General
23 for the State of Nevada, as counsel for Respondents.

24 It is further ordered that the Clerk of Court provide copies of this order and all prior
25 filings to the Attorney General in a manner consistent with the Clerk of Court's current
26 practice, such as regeneration of notices of electronic filing.

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1 It is further ordered that no response by the Attorney General is necessary.

2 DATED THIS 8th Day of April 2022.

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5 MIRANDA M. DU
6 CHIEF UNITED STATES DISTRICT JUDGE
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